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No. 20

IN THE

Supreme Court of the United States

October Term, 1957

SCHAFFER TRANSPORTATION COMPANY and AMERICAN TRUCKING ASSOCIATIONS, INC., *Appellants,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

On Appeal from the United States District Court for the District of South Dakota, Northern Division

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APPELLANTS' BRIEF

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IN THE

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No. 20

SCHAFFER TRANSPORTATION COMPANY and AMERICAN TRUCKING ASSOCIATIONS, INC., *Appellants,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

On Appeal from the United States District Court for the District of South Dakota, Northern Division

APPELLANTS' BRIEF

OPINION BELOW

The opinion of the United States District Court for the District of South Dakota, Northern Division (R. 359) is reported at 139 F. Supp. 444. The report of the Interstate Commerce Commission (R. 24) appears at 63 M.C.C. 247.

JURISDICTION

The judgment of the lower court (R. 369) was entered on May 25, 1956 (R. 373), and notice of appeal (R. 370) was filed on July 19, 1956. Probable jurisdiction was noted by this Court on December 3, 1956. (R. 372). 352 U. S. 923, 77 S. Ct. 220. Jurisdiction to review the decision on direct appeal is conferred upon this Court by Sections

1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§ 1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding § 1, and Sections 206 and 207 of the Interstate Commerce Act, as amended, 49 U.S.C. §§ 306 and 307, are set forth verbatim in the Appendix hereto.

QUESTION PRESENTED

Is a motor carrier, in applying for operating authority pursuant to the provisions of Section 207 of the Interstate Commerce Act required to prove that existing *rail* service is inadequate?

Stated another way, the question may be put thusly:

Under the scheme of regulation adopted by Congress and embodied in the Interstate Commerce Act and the National Transportation Policy, are the shippers of the country entitled to service by all available forms of transport, or may the Interstate Commerce Commission determine that only the services of rail transport shall be utilized?

STATEMENT

Appellant, A. W. Schaffer, of Revillo, South Dakota, doing business as Schaffer Transportation Company, is a common carrier by motor vehicle engaged in the transportation of granite and other commodities in interstate commerce pursuant to authority granted by the appellee, Interstate Commerce Commission, under Docket No. MC-93529. (R. 1, 55-57).

By application filed May 28, 1951, as amended, Schaffer, sought from the Commission a certificate of public convenience and necessity authorizing operations, in interstate commerce, as a common carrier by motor vehicle of granite, manufactured and rough, (1) from points in Grant County, South Dakota, to points in ten

states (primarily in the East) and the District of Columbia, and (2) from points in Vermont to points in sixteen states (primarily in the Midwest), over irregular routes. (See Maps, R. 294 and 296.) After appropriate proceedings the report and order of Division 5 of the Commission, in Docket No. MC-93529 (Sub-No. 2), *A. W. Schaffer Extension—Granite*, dated May 24, 1954, (R. 6), found that the public convenience and necessity required Schaffer's proposed operations substantially as requested,[1] that Schaffer was fit, willing and able properly to perform such service and to conform to the applicable laws and regulations and that a certificate authorizing such operations should be granted. (R. 23).

Following petition of numerous protestant railroads the Commission, Division 5, by order of November 12, 1954, reopened the proceeding for reconsideration on the same record. Subsequently, the entire Commission assumed jurisdiction of the proceeding. The report and order of the Commission, dated February 7, 1955, 63 M.C.C. 247, (R. 24), reversed the decision of Division 5 and stated that the record did not sustain the prior finding that public convenience and necessity required the proposed operations. The Commission, Commissioners Cross, Arpaia, Clarke and Winchell, dissenting,[1a] determined that the application should be denied, and the prior order of May 24, 1954, was vacated and set aside. (R. 37-38).

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[1] Because protestant Dingmann, a motor carrier, is authorized to transport granite from points in Grant County, S. D., to points in certain states covered by Schaffer's application, and because Dingmann's service was not shown to be unsatisfactory, Division 5 denied Schaffer's request for authority to serve points covered by Dingmann's certificate, i.e., Maryland, Connecticut, Massachusetts, Vermont, and the District of Columbia. Neither of the appellants complain as to this partial denial.

[1a] The advance sheet copy of the Commission's report (R. 38) fails to show Commissioner Winchell as dissenting. This error is corrected in the bound volume, 63 M.C.C. 258.

By petition dated March 4, 1955, Schaffer requested reconsideration by, and oral argument before, the appellee Interstate Commerce Commission. By petition dated March 9, 1955, appellant, American Trucking Associations, Inc. (hereinafter called A.T.A.), a voluntary nonprofit corporation organized under the laws of the District of Columbia and the national organization of the trucking industry, requested leave to intervene, reconsideration by, and oral argument before the Commission. By order of May 16, 1955, (R. 39), the Commission granted leave to intervene to A.T.A., but denied the petitions for reconsideration and oral argument of both appellants. (R. 40).

Appellants, plaintiffs below, brought this action in the District Court to review the ruling of the Commission. The Court twice intimated in its opinion that it disagreed with the Commission's ultimate conclusion that public convenience and necessity did not require that Schaffer's application be granted, (R. 367, 368), 139 F. Supp. 450, 452; nevertheless, it found that the Commission acted within the scope of its authority, without abuse of discretion, that its action was not arbitrary or capricious, that there were adequate facts to support its findings and that its conclusions were not contrary to law, and dismissed the complaint. (R. 369). Notice of appeal (R. 370) was filed on July 19, 1956, and probable jurisdiction was noted by this Court on December 3, 1956. (R. 372), 352 U. S. 923, 77 S. Ct. 220.

SUMMARY OF ARGUMENT

For the first fifteen years of federal regulation of interstate commerce by motor vehicle, pursuant to the Motor Carrier Act of 1935,[2] the Interstate Commerce

[2] 49 Stat. 543 *et seq.*, now Part II of the Interstate Commerce Act, 49 U.S.C.A. §301 *et seq.*

Commission consistently held that shippers were entitled to adequate service by motor vehicle as well as rail. However, commencing in 1950, the Commission made an abrupt about-face, and in several cases concluded that motor carrier authority would not be granted, where the evidence of record indicated that the existing *rail* service was adequate or "reasonably" adequate to meet the shippers' needs.

The trucking industry is seriously concerned by the Commission's departure from the healthy policy of fostering reasonable competition between the various modes of transportation subject to its jurisdiction. In order to test the validity of the Commission's newly-developed theory that existence of adequate *rail* service bars the right to institute service by motor vehicle, A.T.A. has intervened in several application proceedings before the Commission in which the Commission has adopted that theory.[3] However, in each of the cases referred to the Commission has simply decided, on the same record, that the rail service first considered adequate was, on reconsideration, inadequate to meet the shippers' needs, and therefore motor carrier authority should be granted. Thus, in none of the cases referred to has the Commission faced up to or even discussed the important policy question involved. This proceeding affords, therefore, the first opportunity, for this Court to pass on the power of the Commission to refuse to authorize the institution of motor carrier service because of the availability to the shippers, who desire and support the need for such

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[3] Docket No. MC-10900 (Sub-No. 16), *McCullough Transfer Co. —Extension—Cement in Bulk*; Docket No. MC-111472 (Sub-No. 20), *Diamond Transportation System, Inc.,—Extension—Burlington, Iowa* (harvester-thresher combines); Docket No. MC-111785 (Sub-No. 2), *Fred C. Burns Extension—Rough Lumber*; Docket No. MC-113855, *International Transport, Inc., Extension—Tractors and Farm Machinery*; Docket No. MC-29886 (Sub-No. 72), *Dallas & Mavis Forwarding Co., Inc., Ext.—Sweepers.*

service, of *rail* service which the Commission considers adequate or "reasonably" so.[4]

The importance of the question presented here to the motor carrier industry is obvious. If the Commission's construction of the law is correct, motor carriers will never get a chance to compete with the railroads in many instances, for a finding by the Commission that the existing rail service is reasonably adequate will, *ipso facto*, bar the institution of motor carrier service.

If the Commission's interpretation is upheld, certain shippers will find themselves, with only rail service to rely on, attempting to compete in common market places with other shippers which have the benefit, both rate and service-wise, of competition between the two forms of transportation. That is the situation disclosed by the record herein. The President of one of the country's larger manufacturers of granite monuments, located at Barre, Vt. (R. 222), testified that his company had lost business to competitors in Georgia and Minnesota because it did not have motor carrier service to the midwestern states involved, whereas the competitors did. (R. 230). Ironically, the witness referred to is a Director and Treasurer of the Barre and Chelsea Railroad (of which his company is part owner), which derives over 50% of its revenue from the transportation of granite. (R. 231, 239). Despite this, he supported Schaffer's application. A representative of another such manufacturer, also located at Barre, testified along similar lines. (R. 248, 250).

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[4] When the Commission first denied reconsideration in *McCullough*, complaint was filed by the applicant therein and A.T.A. in the U.S. District Court for the Northern District of Ohio (Eastern Division) to test the validity of its ruling. However, before the court case had proceeded further, the Commission reopened its docket, held further hearings and ultimately authorized three motor carriers to transport cement in bulk, the commodity involved.

Large shippers, it may be assumed, unable to secure for-hire motor carrier service, will institute their own trucking operations.[5] Thus, the Commission's denial of for-hire motor carrier authority in cases of this kind imposes the greatest burden upon the small shipper which can least afford the expense of entry into the trucking field.

As we shall demonstrate, the Commission's report on reconsideration complained of herein, dated February 7, 1955, violates the underlying purpose of the Interstate Commerce Act and contravenes the provisions of the National Transportation Policy in arbitrarily refusing to authorize the institution of the superior motor carrier service sought to be provided, and thereby promoting railroad monopoly.

ARGUMENT

Commission's Consistent Construction

From the beginning of federal regulation of motor carriers, the Commission has consistently recognized that the existence of adequate rail service affords no basis for the denial of motor carrier operating authority. In *Bowles Common Carrier Application*, 1 M.C.C. 589, 591, the Commission said:

> Interveners point out that the growth of motor-carrier transportation, and consequent diversion of traffic from the rails to the highways, has contributed to large traffic losses by rail carriers, a diminution of their revenues, and an impairment of the value of their securities. They contend that the public convenience and necessity do not require the

[5] This is often an unsatisfactory solution to the problem even for the shipper who can afford the expense of providing his own truck service. Such a shipper may, for example, much prefer to avoid the many problems connected with instituting his own truck service, such as union negotiations, payment of state registration and other highway use taxes, etc.

proposed services and that the grant of a certificate to applicant would be inconsistent with the policy of Congress declared in section 202(a) of the Act. One of the bases for this contention is that all of the origins and all of the destinations, except Elkhorn, now have adequate service by rail. We are advised by statute that it is the policy of Congress to foster and preserve in full vigor both rail and water transportation, but we are also directed in section 202(a) to regulate transportation by motor carriers in such manner as to recognize and preserve its inherent advantages. There are certain inherent advantages in the transportation of petroleum products by motor vehicle. Among these are the reduction in amount of gasoline and other petroleum products which jobbers must keep on hand in storage tanks, and the elimination of the expense of trucking rail shipments of such products at destinations from tank cars to those jobbers who do not have storage faciilties adjacent to the rail carriers' tracks. *That a particular point has adequate rail service is not a sufficient reason for denial of a certificate;* shippers and consignees of petroleum products are entitled to adequate service by motor vehicle as well as by rail. (Emphasis ours.)

The principle established in the *Bowles* case was reapplied down through the years in motor freight common carrier[6] and contract carrier[7] cases.

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[6] *Maas*, 4 M.C.C. 65, 67 (livestock), *Petroleum Transit Corp. Com. Car. Application*, 3 M.C.C. 607, 609 (petroleum products), *Inter-City Trucking*, 4 M.C.C. 155, 159 (general commodities), *Jossy & Livingston*, 8 M.C.C. 143, 144 (general commodities), *L & N Moving & Storage*, 9 M.C.C. 130, 132 (new furniture), *Murphy Transfer Co.*, 9 M.C.C. 361, 363 (granite), *War Eagle Oil Co.*, 10 M.C.C. 710, 713 (petroleum), *Brooks Gillespie Motors, Inc.*, 10 M.C.C. 451, 154 (automobiles and trucks), *Heartz*, 10 M.C.C. 634, 636 (granite), *Commercial Carriers*, 12 M.C.C. 479, 484 (automobiles), *Petroleum Transit Corp. Ext.*, 11 M.C.C. 164, 166 (petroleum products), Moore, 12 M.C.C. 358, 360 (livestock), *Crossett*, 14 M.C.C. 363, 364-65 (petroleum), *Clemans*, 16 M.C.C. 235, 237-38 (general commodities), *Clark Ext.*, 16 M.C.C. 535, 539 (automobiles, trucks, etc.), *Reeser*, 16 M.C.C. 663, 666 (automobiles and trucks), *Swanson*, 17 M.C.C. 251, 252 (livestock), *Laird*

The principle of the *Boules* case was applied as well

Extension of Operations—Alturas, Calif., 18 M.C.C. 123, 130 (general commodities), *Rupp Extension—Feed and Farm Machinery*, 21 M.C.C. 9, 10 (feed and farm machinery), *Patterson Extension of Operations—Nev.—Utah*, 21 M.C.C. 261, 268 (general commodities, ore and concentrates), *Northern Truck Lines, Inc., Extension—Petroleum Products*, 22 M.C.C. 578, 580 (petroleum products), *Vance Trucking Co., Inc., Extension—Maryland*, 22 M.C.C. 750, 751 (tobacco and empty containers), *Atlantic States Motor Lines, Inc., Extension—Lyman, S.C.*, 22 M.C.C. 787, 789 (liquid caustic soda), *Philadelphia-Detroit Lines*, 23 M.C.C. 211, 216 (new automobiles), *Brady*, 23 M.C.C. 767, 778 (general commodities), *Western Auto Transports*, 26 M.C.C. 97, 99 (new automobiles), *McDowall*, 26 M.C.C. 755, 760 (automobiles and trucks), *Smith*, 27 M.C.C. 533, 535 (general commodities), *Zimmerman Contract Carrier Application*, 27 M.C.C. 650, 651 (brick and tile), *Pittman*, 27 M.C.C. 679, 682, (general commodities), *Northern Truck Lines*, 28 M.C.C. 200, 203, (petroleum), *Burlington Truckers, Inc.*, 29 M.C.C. 345, 350 (yarn and related products and supplies), *Crabb and Jespersen*, 30 M.C.C. 687, 689, aff. 42 M.C.C. 844 (petroleum products), *Newton*, 43 M.C.C. 787, 792 (frozen fruits and vegetables), *Thrun*, 46 M.C.C. 484, 487 (general commodities), *Kenosha Auto Transport Corp. Ext.—Laredo*, 49 M.C.C. 423, 425 (new motor vehicles and chassis), *England Transp. Co., Inc., Extension—Mississippi Points*, 49 M.C.C. 567, 571 (pipe and general commodities), *Thomas Trucking Co., Inc. Ext.—Glass*, Docket No. MC-64806 (Sub-No. 1), (Div. 5, unreported, decided October 27, 1950) 52 M.C.C. 809.

[7] *Hayden Extension of Operations*, 7 M.C.C. 671, 672, (paper products), *Meilander Contract Carrier Application*, 8 M.C.C. 230, 231 (farm machinery and fertilizer), *Columbia Terms. Co. Ext.—Roxana, Ill.—St. Louis, Mo.*, 9 M.C.C. 727, 729 (petroleum products), *Hicks Contract Carrier Application*, 9 M.C.C. 752, 754 (farm products and equipment), *Junker Contract Carrier Application*, 13 M.C.C. 603, 605 (groceries), *Reliable Van & Warehouse Co. Ext.*, 14 M.C.C. 81, 83 (explosives), *Green Contract Carrier Application*, 18 M.C.C. 91, 92 (canned goods and beer), *Marchese Contract Carrier Application*, 18 M.C.C. 359, 360 (wire and steel reinforcements), *Rainville Contract Carrier Application*, 20 M.C.C. 307, 309 (automobiles, trucks, busses), *Panek Contract Carrier Application*, 20 M.C.C. 320, 322 (petroleum products), *Rogers Cartage Co. Ext.—Mo., Ind. and Iowa*, 27 M.C.C. 276, 282 (petroleum products), *Mack's Transport Service, Inc., Ext.—Montana, Idaho*, 27 M.C.C. 367, 369 (automobiles, trucks, bodies), and *Ford Bros. Ext.—Virginia*, 47 M.C.C. 731, 735 (petroleum products).

in motor carrier passenger application proceedings.[8]

The decisions of the Commission in cases involving applications by other modes of transportation,[9] and by freight forwarders,[10] have followed the same line of reasoning, and have consistently held that the existence of adequate service by competing transportation agencies affords no basis for denial of the authority sought.

Congress' Confirmation of the Commission's Construction

Section 202(a) of the Motor Carrier Act, 1935, as originally enacted, expressed the Congressional policy

> . . . to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such

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[8] *Intermountain Transportation Co. Ext.—Bonners Ferry*, 8 M.C.C. 410, 414, 416, *Northland Greyhound Lines, Inc., Ext.*, 8 M.C.C. 612, 613, *Intermountain Transp. Co. Ext.—Great Falls—Glasgow*, 9 M.C.C. 15, 18, *Edwards Motor Transit Co., Ext.—Bradford—Buffalo*, 12 M.C.C. 502, 505, *White Circle Line Common Carrier Application*, 16 M.C.C. 516, 519, *Oregon Motor Stages Extension—Wolf Creek Highway*, 18 M.C.C. 732, 735, and *Tri-State Transit Co. Ext.—Jackson, Tenn.*, 29 M.C.C. 381, 393.

[9] *Commercial Barge Lines, Inc., Ext.—Automobiles*, 260 I.C.C. 701, 709; *Bintliff Common Carrier Application*, 260 I.C.C. 727, 732; *Canadian-Gulf Line, Ltd. Contract Carrier Application*, 260 I.C.C. 792, 795; *Pan Atlantic Steamship Corp. Ext.—Port St. Joe*, 265 I.C.C. 169, 176; *Inland Waterways Corp., Ext.—Omaha*, 265 I.C.C. 207, 208; *Norfolk, Balto. & Car. Lines, Inc., Ext.—James River*, 265 I.C.C. 247, 249; *Yankton Barge Line Com. Car. Applic.*, 265 I.C.C. 271, 276; *West Coast S.S. Co. Ext.*, 265 I.C.C. 577, 583; *Coyle Lines Inc. Ext.—Warrior River*, 265 I.C.C. 753, 757; *Seatrain Lines, Inc., Temp. Auth. App.*, 285 I.C.C. 83, 89; *Newtex S.S. Corp. Ext.—Sulphur*, 285 I.C.C. 260, 264; *Gulf Canal Lines, Inc., Ext. and Removal of Limitation*, 285 I.C.C. 291, 300; *Hay Co. Ext.—Milwaukee*, 285 I.C.C. 472, 478; *Seatrain Lines, Inc., Ext.—Savannah*, 285 I.C.C. 509, 517.

[10] *Goldberg Frt. Fwdr. App.*, 285 I.C.C. 239, 243; *Barge Service Corp. Frt. Fwdr. App.*, 285 I.C.C. 249, 252; *Lifschultz Fast Frt. Ext.—Wisc.*, 285 I.C.C. 569, 572.

> carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices: . . .

It was the quoted language which furnished the basis for the statement in the *Bowles case, supra*, that the Commission was directed "to regulate transportation by motor carriers in such manner as to recognize and preserve its inherent advantages," and the ultimate conclusion that shippers and consignees are entitled to adequate service by motor vehicle as well as by rail. When Congress, five years after passage of the Motor Carrier Act, by the Transportation Act of 1940, repeated the provisions of Section 202(a) and substantially reenacted them as part of the National Transportation Policy, it must be presumed to have done so with full knowledge of the Commission's construction of Section 202(a), and to have approved and confirmed such construction: *N.Y., N.H. & H.R. Co.* v. *I.C.C.*, 200 U. S. 361, 26 S. Ct. 272.

As this Court said, in *Brewster* v. *Gage*, 280 U. S. 327, 337, 50 S. Ct. 115, 117:

> The substantial re-enactment in later acts of the provision theretofore construed by the Department is persuasive evidence of legislative approval of the regulation [citing cases]. The subsequent legislation confirmed and carried forward the policy evidenced by the earlier enactments as interpreted in the regulations promulgated under them.

In *I.C.C.* v. *Parker*, 326 U. S. 60, 65, 65 S. Ct. 1490, 1493, this Court said:

> When Congress in 1935 amended the Interstate Commerce Act by adding the Motor Carrier Act, it chose the same words to state the condition for new motor lines which had been employed for similar purposes for railroads in the same act since the Transportation Act of 1920. § 402(18) and (20), 41 Stat. 477, 49 U.S.C.A. § 1(18, 20). Such use indicated a con-

tinuation of the administrative and judicial interpretation of the language.

Departure from Commission's Policy

Recent action of the Commission in the legislative field, we submit, confirms that the present provisions of the Interstate Commerce Act governing issuance of motor carrier authority must be amended before the Commission can validly claim the power to deny motor authority on the ground that present rail service is adequate.

In its 70th Annual Report the Commission included twenty-six recommendations "of fundamental importance" for changes in the laws which it administers. (70th Annual Report, November 1, 1956, pp. 159-176). In one of its Legislative Recommendations, No. 6, the Commission proposed, among other things, that the Act be amended "to provide that additional permits may be issued [to motor contract carriers] only upon a showing that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown."

Subsequently, by letters dated February 8, 1957, addressed to the Chairmen of the Senate and House Committees on Interstate and Foreign Commerce, the Commission proposed specific legislation in the form of draft bills designed to carry out certain of its legislative recommendations, including that relating to contract carriers. Neither the draft bill nor the "justification" therefor, also included in the Commission's letters to the Chairmen of the respective Committees, contain any intimation that the Commission's reference in its Recommendation No. 6 to "existing common carriers" is intended to exclude railroads.[11]

[11] H.R. 5123 and S. 1384 (introduced February 20 and 26, 1957, respectively), proposed to include in § 209 of the Interstate Commerce Act, governing issuance of permits to motor contract carriers, the above-quoted language from the Commission's Legis-

The proposed legislation, therefore, as introduced, would have required an applicant for motor contract carrier authority to first prove that "existing common carriers are unwilling or unable to provide the type of service" which the applicant seeks to render. This is just another way of saying that if existing common carrier service (rail or motor) is not shown to be inadequate, no permit may be issued to perform motor contract carrier service. Bearing in mind that this is the very standard imposed by the Commission upon the applicant herein, despite the absence of statutory authority justifying the imposition of such a burden, it becomes clear that the specific amendment proposed by the Commission is, in effect, an admission that the law does not presently countenance the denial of motor carrier operating authority on the ground that existing rail service has not been shown to be inadequate. And if the Commission should argue that adequate rail service presently bars the institution of motor common carrier, but not motor contract carrier, service we need only point out that the Commission has denied applications by both motor common and contract [12] carriers because of failure to prove inadequacy of rail service. In addition, the present language of the relevant provisions of the Act relating to grants of authority to motor common and con-

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lative Recommendation No. 6. However, as reported by the Senate and House Committees on Interstate and Foreign Commerce, this language was stricken from the bills. S. Rept. No. 703, July 24, 1957; H. Rept. No. 970, August 2, 1957. The Senate report, in commenting on this (p. 4), states: "However, the Commission, upon reflection, on the objections of contract and private carriers to the bill, concluded that in some respects S. 1384 would provide too rigid a pattern. It decided that the proposed requirements in section 209(b) that additional permits could be issued only upon a showing that existing common carriers are unwilling or unable to render the required types of service should be withdrawn."

[12] The *Diamond* case, *supra*, p. 5 (footnote 3) involved an application to perform contract carrier service.

tract carriers (§§ 207(a) and 209(b)) afford no contrast which would justify the Commission in considering the existence of adequate *rail* service as a bar to the institution of one type of motor carrier service but not the other.

Although for the first fifteen years of regulation the Commission, in a multitude of cases, consistently took the position that the adequacy of an existing type of transportation service afforded no basis for denial of an application to render a different and competing type of transportation service,[13] the 1950 report of Division 5 of the Commission in *Kenosha Auto Transport Corp., Extension*, 52 M.C.C. 123, 126 states:

> We are aware that in connection with numerous applications for authority to operate as a motor carrier in interstate or foreign commerce, it has been found that a shipper is entitled to both motor and rail service. But in so finding, the basic issue has always been whether the public convenience and necessity require a proposed operation. We do not, however, believe that, as a matter of law, a finding of public convenience and necessity must necessarily follow a showing that there is no existing motor service. Rather, the issue of public convenience and necessity is a question of fact which depends, among other things, on whether existing service is or is not adequate.

In *Hayes Freight Lines, Inc., Extension—Ball Clay*, 52 M.C.C. 303, also decided in 1950, the Commission denied motor carrier authority on the ground, among others,

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[13] In *Coastal Tank Lines, Inc., Ext.—Steubenville, Ohio*, 47 M.C.C. 520, 524, the opinion of the full Commission (Commrs. Lee, Splawn and Mitchell, dissenting) states: ". . . we have found that the public is entitled to both rail and motor-carrier service, *where, as here, the evidence establishes a need for both services.*" We respectfully suggest that the cited language does not accurately summarize the previous decisions referred to, in that they unequivocably held that shippers were entitled to adequate service by motor as well as rail. Thus the language we have emphasized misstates the rationale of the decisions prior to 1950.

that there was "no proof that the present rail service . . . is in any manner inadequate," a complete about-face from its earlier decisions holding that the existence of adequate rail service furnishes no basis for denial of motor-carrier authority.

We respectfully submit that the decisions in the *Kenosha* and *Hayes* cases, and the report and order complained of herein, contravene the National Transportation Policy. Analysis of the provisions of that Policy reveals no justification for the promotion or maintenance of a monopoly in favor of any form of transportation.

It is *not* the position of appellants, that the Commission must grant motor-carrier authority whenever the record in an application case clearly shows or reasonably suggests the absence of existing motor-carrier service. We recognize, of course, that such a showing, without more, does not satisfy the statutory requirement of public convenience and necessity.

The applicant in any event must sustain the burden of proving that its services are required by the public convenience and necessity, through the degree of proof that it must present will vary from case to case depending on a number of factors, and in fact, will be less substantial in those instances in which the shippers are not presently served by other motor carriers.

What appellants do say is that motor-carrier applicants may not be required, as a part of their burden of proof, to show the inadequacy of existing rail service, because, in any event, its adequacy is insufficient reason for denying a motor-carrier application. And this is what we believe the many Commission citations referred to meant in holding that shippers must be afforded adequate service by motor-vehicle, as well as by rail. Perhaps the following language from *Crabb and Jespersen Common Carrier Application*, 30 M.C.C. 687, 689, makes the point as well as it can be made:

Protestants include in their petition a tabulation of the number of cars of petroleum products transported by them, and the revenue derived therefrom, as an indication of the importance of this traffic and the severe hardship that would result from its loss. It is contended that the territory in question should not have both rail and motor-carrier service, and that it is for this Commission to determine which of these alternate services will best serve the present and future public convenience and necessity. Such a contention cannot be sustained.

The purpose of the act clearly contemplates the existence of transportation by highway as well as by rail. We have uniformly held, in numerous applications by motor carriers for authority to establish service which would be competitive with rail service, that the shipping public is normally entitled to an adequate system of transportation by motor vehicle as well as by rail. In the instant case, when the rails are used, it is necessary to purchase in large quantities, which is an inconvenience to consignees. Furthermore, many of the consignees are not located on railroad sidings. We are convinced, on reconsideration, that the record warrants a grant of authority to applicants to serve a limited territory in South Dakota, and that the public should have available to it both rail and motor-carrier service.

Maintenance of Competition

The Commission has consistently recognized that the Interstate Commerce Act requires the maintenance of reasonable competition. In one of the earliest cases decided, *Re Southern Railway & Steamship Asso.*, 1 I.C.C. 278, 287, the opinion written by Chairman Cooley states:

> In thus deliberately making provision for competition, . . . Congress must be supposed to have done so because the public interest required it. That competition is the life of trade is one of the most generally accepted of maxims; among its principal benefits is the protection it gives against extortionate charges.

And in *Pan-American Bus Lines Operation*, 1 M.C.C. 190, 208, the Commission said:

> Nor are we impressed with the idea that a monopoly of motor bus transportation in a section of the country such as this is necessarily desirable. Public regulation can enforce what may be called reasonable standards of safe, continuous, and adequate service, but it can hardly be expected to take the initiative in experimentation and the development of new types of service. In fact the carriers would probably resist regulation in the courts, if it did undertake to follow such a line, on the ground that it was an invasion of managerial prerogatives and discretion. Competition is the best-known spur to such an endeavor and we are not persuaded that Congress intended to eliminate it in the motor bus field any more than in the railroad field.

In a very recent decision, *Herrin Transp. Co. Ext.—Jacksonville*, the Commission, division 1, authorized the institution of a new motor carrier service between New Orleans and Jacksonville, over the protest of numerous motor carriers. The report in that case, dated February 14, 1957, 69 M.C.C. 629, 638, reiterates the desirability of competition in transportation:

> . . . reasonable competition is in the public interest and should stimulate service and increase commercial intercourse between the areas involved. In addition it should serve as a deterent to future deteriorations in service which are contrary to the public interest. Both the courts and the Commission have long recognized that reasonable competition should be encouraged, and that regulated monopoly, in most instances, is not a substitute therefor.

The desirability of competition between the different modes of transportation has been clearly established. In *Naval Stores From Mississippi to Gulf Ports*, 235 I.C.C. 723, 733, the Commission said:

> Healthy competition between different agencies of transportation is undoubtedly in the public interest.

This Court has pointed out that it is the duty of the Commission to guard against monopolies in transportation. In *Interstate Commerce Commission* v. *Parker*, *supra*, at 326 U. S. 73, 65 S. Ct. 1497, in which the Court upheld the authority of the Commission to issue certificates of convenience and necessity to a railroad motor carrier subsidiary, it is stated:

> Protestants, the appellee motor carriers, point out that under this interpretation in every case of an application by a rail carrier or its wholly owned subsidiary, for a certificate of convenience and necessity to operate a motor line to render service at way-stations, the Commission will have power, under facts and with limitations in the certificate, previously described, to grant the certificate. This is true. It must be expected, however, that the Commission will be as alert to perform its duty in protecting the public in the maintenance of an efficient motor transportation system as it is in protecting the same public in the successful operation of its rail system. *The Commission is trusted by Congress to guard against the danger of the development of a transportation monopoly. * * * It has the duty to preserve the inherent advantages of each mode of transportation.* (Emphasis ours).

In its second report on reconsideration in *Metler Ext.—Crude Sulphur*, 62 M.C.C. 143, 148, the report of the Commission states:

> Usually it is desirable from the viewpoint of the shipper and in the public interest that competition within reason be encouraged and that there be available to shippers competing modes of transportation, even competing carriers in the same field, but if sound economic conditions in transportation are to be fostered, the advantages of competition must in some instances yield to the needs of the existing carrier or carriers, depending upon the amount of the available traffic and the comparative adequacy of the existing services. * * *

We agree, of course, that there are many instances in which the existing service (whether rail, motor or water) may be entirely adequate to fully satisfy a shipper's requirements for *that particular form of transport.* But the Commission goes further and now espouses the idea that certain shippers and receivers, not presently able to secure motor service, must be forever relegated to the use of rail service only, even though it may be reasonably adequate, while their competitors are able to enjoy the benefits of motor carrier service.

The Senate Select Committee on Small Business late in 1955 addressed an inquiry to the Interstate Commerce Commission, setting forth various questions respecting the several provisions of the Interstate Commerce Act and the National Transportation Policy, and the Commission's administration thereof. On November 28, 1955, the Commission responded to the inquiry. One of the questions (No. 12) posed by the Committee was:

> Why and to what extent should freedom of entry into the trucking business be curtailed? What are the dangers, if any, of unrestricted competition?

A portion of the Commission's answer, quoted next, appears of special significance herein:

> Restrictions upon entry into the trucking business should be imposed only in the interest of the public, not in the interest of existing carriers, although they may incidently [sic] benefit therefrom. Curtailment of entries for the purpose of limiting competition often is warranted as a means of developing a financially responsible and reliable transportation industry. *Competition, however, should be fostered except in circumstances where to dilute the available traffic would result in instability and inefficient service.* (Emphasis ours). "ICC Administration of the Motor Carrier Act", Hearings before the Select Committee on Small Business, United States Senate, 84th Cong., 1st Sess., Nov. 30, Dec. 1 & 2, 1955, p. 326.

In this connection it is interesting to note the comment of the Commission, Division 4, in Docket No. MC-F-5845, *Wells—Purchase—Maddux*, decided December 14, 1955. To the contention of certain motor carrier protestants that approval of the proposed purchase would injure them competitively, the report (Sh. 11) replies:

> The annual gross operating revenues of Northern and Ringsby [protestants] runs into the millions and it seems apparent that any traffic which they may lose as a result of the instant transaction would not prevent them from performing an adequate service to the shipping public under their authorities.

The annual gross operating revenues of the railroad protestants which introduced evidence in this proceeding before the Commission runs not into the millions—but the hundreds of millions[14]—and, *a fortiori*, a grant of the authority sought by Schaffer could not, in the Commission's words, prevent them from performing an adequate service to the shipping public. If, then, as the Commission told the Senate Committee, competition should be fostered "except in circumstances where to dilute the available traffic would result in instability and inefficient service," one is constrained to wonder why the Commission felt these railroad giants needed to be protected from the competition of a relatively insignificant operator such as Schaffer. Undoubtedly, the Com-

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[14] The gross operating revenues of the three railroads referred to at page 256 (R. 36) of the Commission's report, for the year 1954, amounted to more than one-third of a *billion* dollars. The figures listed individually are as follows:

Carrier	*1954 Gross Operating Revenue*
Chicago, Milwaukee, St. Paul & Pacific	$237,745,000
Texas & New Orleans	127,350,000
Central Vermont	10,756,000

SOURCE: C.M. St. P. & P. figure from I.C.C. Bureau of Transport Economics and Statistics Statement No. M-150, December, 1954. Figures for other two roads taken from annual reports filed with I.C.C.

mission will argue that the application was properly denied because, as stated at 63 M.C.C. 257 (R. 37), the witnesses' main purpose in supporting the application is to obtain lower rates rather than improved service. We next deal with this contention.

Basis for Shipper Support of Application

The railroad protestants before the Commission argued that Schaffer's application should be denied because the purpose of the supporting shippers was to secure lower rates, rather than improved service. (R.26). The report of Division 5 met this contention head-on (R. 21) as follows:

> At this point it should be stressed that we agree with exceptants that the level of rates as such is not in issue. We do not agree with them however, that the supporting shippers, except as hereinafter noted, were motivated or influenced solely by their desire for lower rates. While the evidence does reveal that the cost of transportation is of interest to them, their views as to the adequacy of existing service cannot be disregarded for that reason.

The Division's report then goes on to state (R. 21-22) that the record before the Commission shows:

> (1) That rail service on small shipments has resulted in delay and damage;
>
> (2) That the lack or insufficiency of rail sidings has hampered shippers and receivers of granite;
>
> (3) That shippers have been unable to comply with customer requests for truck service in many instances;
>
> (4) That shippers are faced with the disadvantage of having to compete with producers of granite at other locations which have truck service available;
>
> (5) That the lack of truck service has impeded the shippers' ability to increase sales and expand service;
>
> (6) That the lack of truck service prevents deal-

ers from being able to maintain lower inventories, receive their shipments faster and more often, and meet erection deadlines, especially during peak seasons; and

(7) That the lack of truck service results in more crating than would otherwise be necessary, with resulting loss of both time and money.

The Commission's report on reconsideration nowhere indicates that the Division erred in making the findings quoted above. Nevertheless, it concludes, at 63 M.C.C. 257 (R. 37), "that the [rail] service presently available is reasonably adequate," and that the "witnesses' main purpose in supporting the application is to obtain lower rates rather than improved service."

Nothing more need be said respecting the fundamental error of the Commission's holding that if rail service is "reasonably adequate" motor service should not be authorized. We pass then to consideration of its finding that the witnesses' main purpose in supporting the application is to obtain lower rates. This finding, and the conclusion reached therefrom that "this is not a proper basis for a grant of authority and the application, therefore, must be denied", 63 M.C.C. 257 (R. 37), are both untenable.

The Commission has a mandate, by virtue of the National Transportation Policy, to promote "adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers * * *." It ignored this mandate when it completely disregarded the seven compelling reasons set forth by Division 5 as justifying a grant of authority, and apparently substituted its desire to protect railroad revenues from motor carrier competition for the Congressional admonition referred to. The Commission's conclusion that the shippers supported the application to secure lower rates is not supported by the record. It is true that the record shows that some shippers accu-

mulate pool-car shipments, rather than rely on rail l-c-l service, for two reasons. One reason, cited at 63 M.C.C. 257 (R. 37), is to take advantage of the lower rate for carload shipments. But an equally compelling reason, noted at 63 M.C.C. 255 (R. 34), is that less-carload service is inadequate because of delays and damage to merchandise. The Commission's statement, 63 M.C.C. 257 (R. 37), that the record warrants the conclusion that the only real fault with rail service is that it is too slow, seems to be based on facts not of record. The positive testimony of the shipper witnesses respecting the many unsatisfactory aspects of rail service was not refuted of record by the rail protestants.

The record nowhere indicates that the supporting shippers desire lower rates, as such, as distinguished from cheaper and more adequate transportation service by virtue of lower truckload minimum weights, shipper to dealer movements without intervening loading and unloading, and split delivery service afforded by motor carriers. The Commission's statement that it is well established that a desire for lower rates is not a proper basis for a grant of authority is based on cases wherein the record showed that the applicant's supporting shipper witnesses had available the services of protesting motor carriers, which had not been shown to be inadequate, which is decidedly not the situation here. Thus the general rule cited by the Commission (and with which we do not quarrel) is completely beside the point since it cannot validly be applied herein.

The District Court's Fundamental Error

The court below, while noting that "had we been acting in place of the Commission in this case, we may have reached different conclusions . . ." 139 F. Supp. 450 (R. 367), nevertheless felt constrained to uphold the Commission's report and order. In so doing the court said, 139 F. Supp. 451 (R. 367):

> The burden of proof showing a need for the proposed service under the provisions of Sec. 207(a) of the Interstate Commerce Act was upon the plaintiff. The Commission did not deny the application on the ground that rail service in and of itself was adequate. It purported to weigh all of the salient factors constituting proof of need for the service and in the light of the entire record found that there wasn't any need for the service which could not be handled adequately by existing carriers, both motor and rail.

The above portion of the District Court's opinion, we respectfully submit, discloses its fundamental error in upholding the Commission's report and order.

First off, we believe a fair reading of the Commission's report cannot fail to convince that the *primary*, if not the sole, basis for denial of Schaffer's application, was its finding "that the service presently available is reasonably adequate." 63 M.C.C. 257 (R. 37). To be sure, the report, in the same paragraph, goes on to state that "the witnesses' main purpose in supporting the application is to obtain lower rates rather than improved service." It is this latter finding, we assume, which prompted the court to say that the Commission "purported to weigh all the salient factors" in reaching its decision. Although it is obviously impossible to determine arithmetically, or on any other basis, what portion of the Commission's denial of Schaffer's application can be allocated to its finding "that the service presently available is reasonably adequate," it can hardly be denied that that finding was a very important consideration in refusing to allow Schaffer to institute the motor-carrier service sought to be performed. This being so, it necessarily follows that the Commission's decision must be set aside unless this Court is willing to say that the existence of adequate rail service is sufficient ground for denial of an application to provide motor carrier service.

Second, while the Commission's report, in holding that "existing service is reasonably adequate" was less spe-

cific than it should have been, it is clear that the "existing service" referred to was the service of the protestant railroads. Thus the Court's summarization of the Commission's decision, in stating that the Commission found no need for service "which could not be handled adequately by existing carriers, both motor and rail," is in error. Bearing in mind that a portion of the authority applied for by Schaffer had previously been denied by the Commission's division 5 to the extent that it would duplicate that held by Dingmann, the sole motor carrier protestant, as to which partial denial no exception was taken, it will be seen that as to the remainder of the authority sought, there is in reality no existing motor carrier service at all. Thus it is clear that the Commission's reference to "existing service" must be read as "existing rail service" and not, as the court below put it, "both motor and rail."

Preservation of Inherent Advantages of Motor Carrier Service

In motor carrier application proceedings such as this, the railroad protestants invariably ask the Commission to hold that their service is adequate to meet the shipper needs. To put it another way, they ask the Commission to find that the motor service proposed is not sufficiently superior to the existing rail service to justify the grant of authority sought. However, when these same railroads seek to reduce their rates below those of their motor competitors, they are the first to allege that motor carriers have certain inherent advantages which, they claim, require the proposed reduced rail rates. As the Commission observed in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 488, "The effect of the relative advantages and disadvantages of rail versus other modes of transportation is the controlling factor in attempts by the carriers to make their rates according to competitive necessity. Where regular and de-

pendable motor common carrier service is available, its completeness, expedition and flexibility unquestionably give it a certain advantage over rail service." See also, *Alcoholic Liquors in Official Territory*, 283 I.C.C. 219, 227.

The Commission has on numerous other occasions noted that motor carrier service has certain inherent advantages over rail service. In one of these cases, *Canned Goods in Official Territory*, 294 I.C.C. 371, 379 the report of the Commission states:

> There are inherent advantages of motor transportation which have no counterpart in rail service. It is individualized, expedited, and more flexible than rail transportation.

The trucking industry is somewhat confused—we think justifiably—to find that in rate proceedings much stress is laid upon the inherent advantages of motor carrier service, only to find, in application cases, that these same advantages have apparently vanished into thin air.

One thing, however, is certain. The Commission is bound by the National Transportation Policy to preserve the inherent advantages of motor carrier service. Such advantages can hardly be preserved by a refusal to authorize service which would make them available to shippers. Despite this, the decision herein indicates abandonment by the Commission of the salutary principle that shippers are entitled to adequate service by motor vehicle, as well as rail.

Right of Existing Carriers to Transport Available Traffic

The Commission can be expected to defend its report and order complained of herein on the ground that it consistently has held in motor carrier application proceedings that existing carriers should be permitted to handle all available traffic without the intrusion of a new competitor. However, from the inception of regu-

lation pursuant to the provisions of the Motor Carrier Act of 1935, the Commission has invoked this principle only to avoid an excess of intra-agency competition, never to exclude inter-agency competition. In *C & D Oil Co. Contract Carrier Application*, 1 M.C.C. 329, 332, the Commission stated:

> . . . To foster sound economic conditions *in the motor industry*, existing *motor carriers* should normally be accorded the right to transport all traffic which they can handle adequately, efficiently and economically in the territories served by them, . . . [Emphasis added].

The *C & D* case became the leading case on this point and was cited with approval or actually quoted in some fifty reported Commission decisions.[15]

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[15] *Clark*, 1 M.C.C. 445, 448; *Wellspeak*, 1 M.C.C. 712, 715; *Smith*, 1 M.C.C. 717, 719; *Empire Petrol & Transport Co., Inc.*, 2 M.C.C. 12, 13; *Coomes*, 2 M.C.C. 52, 54; *Carr*, 2 M.C.C. 263, 269; *Vitullo*, 2 M.C.C. 413, 414; *Walton*, 2 M.C.C. 474, 476; *Justice*, 2 M.C.C. 699, 700; *Marini*, 2 M.C.C. 727, 728; *Morgangey*, 3 M.C.C. 26, 28; *Harrison & Harrison*, 3 M.C.C. 76, 78; *Myers Trucking Co.*, 3 M.C.C. 273, 275; *Nelson Bros. Oil Co.*, 3 M.C.C. 367, 368; *Smith*, 3 M.C.C. 747, 748; *Bourn*, 3 M.C.C. 765, 766; *Vigeant*, 3 M.C.C. 797, 799; *Monell*, 4 M.C.C. 28, 30; *Kuczinski*, 4 M.C.C. 45, 46; *Lake Champlain Transport Lines*, 4 M.C.C. 125, 128; *Castranova*, 6 M.C.C. 769, 770; *Eastern Shore Oil Co.*, 7 M.C.C. 173, 176; *Waldorf Distributing Co.*, 8 M.C.C. 543, 545; *Augilera*, 9 M.C.C. 34, 35; *Stegall*, 9 M.C.C. 475, 476; *D'Agata*, 10 M.C.C. 149, 150; *Woodlief*, 10 M.C.C. 91, 95; *Panacek*, 10 M.C.C. 677, 678; *Taylor*, 11 M.C.C. 155, 156; *Scott Ext. of Operations*, 11 M.C.C. 227, 228; *Pack Ext. of Operations*, 14 M.C.C. 31, 32; *Shelly*, 14 M.C.C. 272, 274; *La Faver*, 14 M.C.C. 309, 311; *J. J. Hoy, Jr., Ext.—N.Y., N.J., and Conn.*, 14 M.C.C. 797, 800; *Foreman*, 16 M.C.C. 467; *Hypes Ext.—Ill., Southern Iowa*, 16 M.C.C. 543, 544; *Bussman and Merritt*, 16 M.C.C. 577, 578; *McNutt Ext. of Operations—Davenport*, 16 M.C.C. 590, 592; *Foote & Hynes Trucking Co., Inc.*, 18 M.C.C. 161, 162; *Burwen*, 19 M.C.C. 644, 646; *Provan*, 19 M.C.C. 682, 684; *Riddle*, 20 M.C.C. 143, 144; *Zechman Ext. of Operations—Brick*, 21 M.C.C. 247, 250; *Gabler*, 21 M.C.C. 713; *Fields Ext. of Operations—Charlottesville*, 21 M.C.C. 788, 789; *Daum Ext. of Operations—Ill.*, 22 M.C.C. 366, 367; *Brown Ext. of Operations—Oleomarga-*

It is evident from the language of the *C & D* case and of the cases following it that the concern of the Commission in excluding competition was with the welfare of the existing *motor* carriers. To be sure, in some of the cases railroads as well as motor carriers were rendering the existing service which the Commission sought to protect. For example, in *Lake Champlain Transp. Lines Contract Carrier Application*, 4 M.C.C. 125, 128, the Commission said:

> Protestants' evidence indicates that, in addition to applicants' service, there are available to the shippers of granite, marble and slate from and to the considered territories the service of numerous motor and rail carriers. There is no showing that such carriers cannot handle all available traffic adequately, efficiently, and economically, or that there is any public need for additional service.

Similar references to transportation by established carriers by rail *and* motor vehicle appears in *Smith Contract Carrier Application*, 1 M.C.C. 717, 719. Nevertheless it was the economic condition of the existing motor carriers with which the Commission was concerned, and not that of the rail carriers. Thus in *Justice Common Carrier Application*, 2 M.C.C. 699, 700, though there were rail protestants, the Commission said, ". . . there are a large number of motor carriers operating in this territory. Ordinarily these carriers should be accorded the right to transport all the traffic that they can handle adequately, economically, and efficiently." Similar expressions can be found in *Brundage Common Carrier Application*, 11 M.C.C. 187, 190; *Rabinowitz Common Carrier Application*, 4 M.C.C. 587, 588; *Georgia Motor Express Inc., Common Carrier Application*, 10 M.C.C. 159, 164;

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rine, 24 M.C.C. 315, 317; *Rock*, 24 M.C.C. 348, 350; *Kirk*, 24 M.C.C. 431, 432; *McCoy Truck Lines, Inc., Ext.—Cedar Falls—Fort Dodge*, 26 M.C.C. 585, 589; *Jorgensen Ext., of Operations—Illinois*, 30 M.C.C. 459, 461.

and *Pine Tree Transp., Inc., Ext.—Frozen and Canned Fruits*, 54 M.C.C. 667, 675; and in numerous other Commission proceedings.[16]

That the Commission has invoked this principle in motor-carrier application proceedings only for the pro-

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[16] *Reymers, Ext.—Klamath Falls, Etc.*, 11 M.C.C. 434, 436; *J. W. Dresher Co., Inc.*, 12 M.C.C. 63, 66; *Lehr Ext. of Operations—Glass*, 13 M.C.C. 777, 778; *Cox*, 14 M.C.C. 777, 779; *Carpenter*, 17 M.C.C. 693, 697; *Pregler Ext. of Operations*, 18 M.C.C. 257, 259; *Hansen*, 18 M.C.C. 655, 656; *Burwen*, 19 M.C.C. 644, 645; *Lemon*, 20 M.C.C. 209, 210; *Kessell Ext. of Operations*, 20 M.C.C. 653, 654; *Pelicano*, 21 M.C.C. 203, 205; *Kundel*, 21 M.C.C. 414, 416; *E. F. Enoch, Inc.*, 22 M.C.C. 510, 513; *Smith Ext. of Operations—Iowa and Ill.*, 23 M.C.C. 128, 130; *Sunrise Trail, Inc., Ext.—Spokane, Wash.*, 23 M.C.C. 267, 270; *Murphy Ext. of Operations—Wool Oil Softener*, 23 M.C.C. 309, 312; *Ingham Brokerage, Inc., Ext.—New Commodities*, 23 M.C.C. 175, 177; *Ferreira*, 26 M.C.C. 385, 387; *McClendon, Ext. of Operations—Chattanooga, Tenn.*, 26 M.C.C. 590, 592; *Eastern Exp. & Haulage, Inc., Ext.—Port Chester, N.Y.*, 26 M.C.C. 657, 659; *Seal*, 26 M.C.C. 685, 688; *Motor Haulaway Co.*, 27 M.C.C. 19, 25; *Tom Still Transfer Co., Inc.*, 27 M.C.C. 42, 44; *Lee and Eastes Ext. of Operations—Yakima, Wash.*, 27 M.C.C. 653, 659; *Miller Ext. of Operations—Vernon—Memphis, Texas*, 27 M.C.C. 731, 735; *Inland Motor Freight Ext.—Milton, Oreg.*, 27 M.C.C. 784, 787; *Glupker, Ext.—Ind., Ill., and Ohio*, 29 M.C.C. 723, 728; *Keele*, 30 M.C.C. 173, 181; *English Ext. of Operations—New Orleans*, 31 M.C.C. 435, 441; *Deaton Truck Lines, Inc.*, 32 M.C.C. 89, 100; *Whisenant*, 32 M.C.C. 239, 243; *West Coast Bus Lines*, 32 M.C.C. 619, 633; *H. & B. Trucking Co., Inc.*, 33 M.C.C. 211, 215; *Holland Transp. Co., Inc., Ext.—Mass.*, 33 M.C.C. 558, 560; *Thompson Ext. of Operations*, 34 M.C.C. 5, 13; *Bass Bondeil Trucks, Inc.*, 34 M.C.C. 39, 44; *Bisceglia*, 34 M.C.C. 233, 240; *Stucki and Wittwer*, 34 M.C.C. 756, 759; *Contract Carriers, Inc.*, 41 M.C.C. 165, 170; *Clark-Callahan, Inc.*, 41 M.C.C. 693, 706; *Santa Fe Trail Transp. Co. Ext.—Joplin*, 41 M.C.C. 713, 715; *Maner*, 42 M.C.C. 778, 787; *Major*, 43 M.C.C. 795, 799; *Sanders Ext. of Operations—Washington, D.C.*, 47 M.C.C. 210, 214; *Robinson*, 47 M.C.C. 347, 352; *M & H Transport Service Co. Ext.—Willow Run*, 47 M.C.C. 409, 412; *Squaw Transit Co.*, 48 M.C.C. 17, 22; *Black Ext. of Operations—Prefabricated Houses*, 48 M.C.C. 695, 708; *D. T. & C. Inc., Ext.—Willow Run, Mich.*, 49 M.C.C. 231, 240; *Parke & Son, Inc. Ext.—Numerous States*, 51 M.C.C. 422, 440; *New York Central R. Co. Ext.—Congers, N.Y.-Jersey City*, 61 M.C.C. 457, 462.

tection of existing motor carriers would appear from the Commission's decision in *Sheriff Motor Co. Contract Carrier Application*, 6 M.C.C. 247, 251. No motor carriers protested, but the trunk-line rail carriers opposed the granting of the application. There was no evidence of the availability of motor carrier service but only of rail service. The protestants cited the *C & D* case in support of their contention that the application should not be granted. The Commission said, "the circumstances in the present situation are quite different. The evidence here shows that existing carriers cannot as adequately or efficiently perform the desired service as can applicant."

This principle cannot be invoked where, as here, there is no existing motor-carrier service and its application would have the effect of preserving a railroad monopoly.

CONCLUSION

The report complained of herein demonstrates a mistaken impression as to the Commission's power, as well as its duty, under the Interstate Commerce Act. Where, as here, the need for motor-carrier service has been so clearly demonstrated, we think the Commission has a positive duty to grant the authority sought and thus make available to the shipping public the inherent advantages of such service. And even if the rail service could more accurately be said to be "reasonably adequate" the National Transportation Policy requires that shippers have made available to them adequate motor vehicle, as well as rail, service. The report seems to indicate that there is something almost reprehensible in a shipper desiring cheaper and faster service; yet the National Transportation Policy, among other things, specifically requires the Commission to promote—not obstruct—"adequate, economical, and efficient service" by the several carriers subject to its jurisdiction.

In *D. A. Stickell & Sons, Inc.* v. *Alton R. Co.*, 255 I.C.C. 333, 337, the Commission said:

> It is not the province of railroads to determine what markets shall be available to sellers or buyers, or, by the refusal to establish through routes or the maintenance of rate disadvantages, to restrict or circumscribe the opportunities of shippers located on other railroads to sell in markets served by them. It is their function to transport in the channels necessitated by trade conditions and not to fix limitations on commerce. The public interest demands that all shippers be accorded relatively equal opportunities to reach all reasonably available markets.

Paraphrasing the above in the light of the record herein, it is respectfully contended that it is not the province of the Commission to determine what modes of transportation shall be available to sellers or buyers, or by the refusal to authorize truck service, to restrict or circumscribe the opportunities of shippers to compete in markets by the use of such service. It is its function to see that reasonable competition between the different agencies of transportation is fostered and preserved and not to fix limitations on commerce. The public interest demands that all shippers be accorded relatively equal opportunities to reach all reasonably available markets through utilization of all available transportation agencies. The Commission, Division 4, put the matter succinctly in *Levisa River R. Co. Construction*, 257 I.C.C. 203, 218:

> Shippers in any territory should not be denied the widest possible choice of markets over the shortest and most economical routes, if that can be avoided.

The decision herein is contrary to the National Transportation Policy. It promotes inadequate and inefficient rail service, and fails to recognize and preserve the inherent advantages of truck service. It abandons the duty, set forth in the *Parker* case, *supra*, of "protecting the

public in the maintenance of an efficient motor transportation system" and promotes, rather than guards against, a transportation monopoly.

Wherefore, appellants pray that the judgment of the lower court be reversed and the case remanded with instructions to suspend, enjoin, annul, and set aside the report and order of the appellee, Interstate Commerce Commission, complained of herein, and for further proceedings consistent with this Court's opinion, and that this Court grant such further relief as it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 26th day of August, 1957, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof in a duly addressed envelope, with airmail postage prepaid, to Clinton G. Richards, Esq., United States Attorney, Sioux Falls, S. D., and by mailing a copy in a duly addressed envelope, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the intervening railroads, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to H. F. Chapman, Esq., Security Bank Building, Sioux Falls, S. D., and Amos M. Mathews, Esq., 280 Union Station Building, Chicago 6, Illinois.

4. On the National Industrial Traffic League, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Robert N. Burchmore, Esq., 2106 Field Building, Chicago 3, Illinois.

PETER T. BEARDSLEY

APPENDIX

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U. S. C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * *

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. [*August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950.*] [*49 U.S.C., § 306.*] (a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway,

or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if

there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(2) Unless otherwise specifically indicated in such certificate, the holder of any certificate heretofore issued under this part, or hereafter issued under this part pursuant to an application filed on or before the date on which this paragraph takes effect, authorizing the holder thereof to engage as a common carrier by motor vehicle in the transportation in interstate or foreign commerce of passengers or property over any route or routes or within any territory, may without making application under this section engage, to the same extent and subject to the same terms, conditions, and limitations, as a common carrier by motor vehicle in the transportation of passengers or property, as the case may be, over such route or routes or within such territory, in commerce between places in the United States and places in Territories or possessions of the United States.

(3) Subject to the provisions of section 210, if any person (or its predecessor in interest) was in bona fide operation on March 1, 1950, over any route or routes or within any territory, as a common carrier engaged in the transportation of passengers or property by motor vehicle in commerce between any place in the United States and any place in a Territory or possession of the United States, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on March 1, 1950, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to interruptions of service over which such applicant or its predecessor in interest had no control, the Commission shall issue a certificate authorizing such operations without

requiring further proof that public convenience and necessity will be served thereby, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after the date on which this subparagraph takes effect. Pending the determination of any such application, the continuance of such operation without a certificate shall be lawful. Any carrier which, on the date this subparagraph takes effect, is engaged in an operation of the character specified in the foregoing provisions of this subparagraph, but was not engaged in such operation on March 1, 1950, may under such regulations as the Commission shall prescribe, if application for a certificate is made to the Commission within one hundred and twenty days after the date on which this subparagraph takes effect, continue such operation without a certificate pending the determination of such application in accordance with section 207(a).

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

ISSUANCE OF CERTIFICATE

SEC. 207. [*August 9, 1935.*] [*49 U.S.C. § 307.*] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application; if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any propietary or property rights in the use of the public highways.